IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1806 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SHAILSING @ SHAILESH NARPAT- SINGH SOLANKI

Versus

STATE OF GUJARAT

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Appearance:

1. Special Civil Application No. 1806 of 2004

MR HR PRAJAPATI for Petitioner No. 1

MR MR PRAJAPATI for Petitioner No. 1

MR AY KOGJE, AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

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CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 22/07/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 15-01-2004. By the said order, the petitioner is detained as a "bootlegger" under P.A.S.A. Along with the order of detention, petitioner is also served with the grounds of detention. In the grounds of detention, there is a

reference about three criminal cases pending against the petitioner. All these cases are registered under the Bombay Prohibition Act. In the grounds of detention, the detaining authority has also relied upon the statement of two secret witnesses and the authority has claimed privilege under Section 9 (2) of the Act and, therefore, the names of those two witnesses have not been disclosed. The aforesaid order of detention is challenged by the petitioner on various grounds.

2) Mr.Prajapati, learned advocate for the petitioner submitted that the last offence registered against the petitioner is of 19th September, 2003 and the order of detention is passed on 15th January, 2004, therefore, there is a delay of about more than three months. He submitted that in view of this delay, the order of detention is required to be quashed and set aside.

3) Mr.Kogje, learned AGP, submitted that the petitioner was not arrested immediately as he was absconding and as the petitioner was arrested on 26th December, 2003, there is hardly any delay in passing the order of detention.

4) In view of above, there is no delay in passing the order of detention as the petitioner was arrested on 26th December, 2003 and the order of detention is passed on 15th of January, 2004. Such delay cannot be taken seriously as the detaining authority is required to take appropriate care before passing the order of detention. Therefore, the contention of Mr.Prajapati regarding delay in passing the order of detention is negatived.

5) Mr.Prajapati, learned advocate for the petitioner further submitted that before claiming privilege under Section 9 (2) of the Act, the authority has not tried to verify about the credentials and character of the detenu. He submitted that the privilege is claimed in a routine manner and, therefore, without any basis the authority has tried to withhold the names of witnesses and as a result of that the petitioner is denied the valuable right of making effective representation. To substantiate his say, Mr.Prajapati has relied upon the decision of this Court rendered in the case of KISHOR NAGJIBHAI PARMAR v. STATE OF GUJARAT, reported in 2000 (4) GLR 3236, wherein it is held in para 11 as under :

> "11. In this view of the matter, the detaining authority while exercising powers under Section 9 (2) of the P.A.S.A.Act for claiming privilege is expected to consider the general background,

> character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising privilege under Sec. 9 (2) of the P.A.S.A. Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need of exercise of powers under Sec. 9 (2) of the P.A.S.A. Act and claim privilege by not disclosing identity of the anonymous witnesses."

6) On the other hand, on the basis of the affidavit-in-reply, Mr.Kogje, learned AGP, has submitted that the detaining authority has taken care before claiming privilege under Section 9 (2) of the Act, but the original file is not made available for the perusal of the Court.

7) However, in the aforesaid judgement after relying upon the judgement of the Division Bench, the learned Single Judge has specifically stated that the authority is required to take independent steps for considering general background, character, antecedents, criminal tendency etc., before reaching the subjective satisfaction while exercising powers under Section 9 (2) of the Act. As the said aspect is missing in this case also, the privilege claimed by the authority in this case is not genuine and proper.

8) Mr.Prajapati has also submitted that if the statements of witnesses are taken out, then it cannot be said that the detenu has committed breach of public order and for this purpose, he has relied upon the decision of the Division Bench of this Court rendered in L.P.A. No.223/2000, wherein in para 5, it is held as under :

"5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala v. State of Gujarat (Supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the

statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without

> substance. The impugned order passed by the learned single Judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

9) In the above judgement, Division Bench of this Court has held that on the basis of registered criminal cases under the Bombay Prohibition Act, it cannot be said that there is violation of public order.

10) In view of the judgements referred above, the order of detention is required to be set aside, as, it cannot be said that privilege is properly claimed by the authority under Section 9 (2) of the Act, and also on the ground that the breach of public order is not established.

11) Mr.Kogje, learned AGP, has pointed out that the petitioner is habitually dealing in foreign liquor and he is a confirmed bootlegger. If that is so, it is the duty of the concerned Public Prosecutor to argue the case effectively before the concerned Magistrate pointing out that the petitioner is a habitual offender and it is for the concerned Magistrate to consider such application on its own merits and in accordance with law. So far as this aspect is concerned, this Court is not required to express its opinion in this matter, which is in connection with preventive detention of the petitioner.

12) For the foregoing reasons, this petition is allowed. The order of detention dated 15-01-2004 is quashed and set aside. The detenu, Shailsing alias Shailesh Narpatsingh Solanki is ordered to be set at liberty forthwith, if he is not required in connection with any other case. Rule is made absolute.

(P.B.Majmudar,J.)

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